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No. 82-628

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

ENERGY RESERVES GROUP, INC., *et al.*,
Petitioners,

v.

DONALD PAUL HODEL, SECRETARY OF ENERGY, *et al.*,
Respondents.

On Petition For A Writ Of Certiorari To The Temporary Emergency Court Of Appeals Of The United States

REPLY MEMORANDUM

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REPLY MEMORANDUM

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1. The government modestly fails to acknowledge the amount of money involved here and the widespread importance of this case to the petroleum industry. It is undisputed that thousands of individuals and businesses are affected and that upwards of one billion dollars already have been paid into escrow for distribution at the termination of litigation. Even though the program of federal petroleum price controls has ended, the substantial amount of private monies at stake itself is sufficient to warrant review. *See, e.g., United States* v. *Chicago, B. & Q. R. Co.*, 412 U.S. 401, 404-05 n.6 (1973).[1]

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[1] Moreover, it seems clear that the issue resolved in this case has substantial continuing importance under the windfall profit tax. *See* Pet. 15. The government's argument to the contrary, Br. in Opp. 7 n.7, assumes that Congress intended to fix the tax by reference to

No fewer than four states have filed briefs as *amici curiae* in this case. Three states, Texas, Oklahoma, and Wyoming, recognize that the decision below is contrary to their interests and urge that the petition be granted. One state, Illinois, believes that it will benefit from the decision below and for that reason urges denial. These states' participation, whether for or against the petitioners, emphasizes the importance of the case and the propriety of plenary review.

2. The government fails to come to grips with the serious deficiencies in its position.

a. It is beyond question, and the government does not contend otherwise, that the overriding congressional objective in enacting the exemption for stripper properties was to maximize production from existing reservoirs. *See* Pet. 23. The inclusion of injection wells in the well count furthers that objective.[2] Their exclusion from the well count hinders it. In the absence of a plain expression of congressional intent ruling out the inclusion of injection wells, and there is no such expression of intent, the statute should be construed in the manner that would further its principal objective.

b. For more than forty years, the Department of Interior has administered an essentially identical statutory provision relating to stripper properties under the Mineral Land Leasing Act of 1920 and has taken the position that injection wells "shall be counted as producing wells." 30 C.F.R. § 221.49(b). *See Marathon Oil Co.* v. *Kleppe*, 556 F.2d 982, 986 (10th Cir. 1977). At least some legislators had expected that precedent to be followed here. *See* note 8, *infra*. The government in this case has never explained why two federal agencies

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DOE's regulations even if those regulations themselves were invalid because contrary to congressional intent. That assumption, which is in the nature of a prediction about how the courts would construe the taxing statute, is dubious at best.

[2] The government has conceded this. *See* Pet. 26 n.12.

should be permitted to construe and apply identical statutory language in a diametrically opposite manner. Nor has it given any reason for believing that the Department of Interior's long-standing interpretation and practice were inapposite or unpersuasive guides to construction here.

c. Notwithstanding the fact that the Department of Interior has administered injection wells for more than four decades without any experience of manipulation or abuse,[3] the only substantive reason DOE has given for excluding injection wells from the well count in this case is the asserted need to guard against abuse. Not even this reason was given at the time the agency issued Ruling 1974-29. It emerged as the *post hoc* rationalization of the government's litigation counsel. On this basis alone, it should have been disregarded. *See* Pet. 22.

From the outset, the agency has jealously sought to insulate its proffered rationale from public scrutiny. Ruling 1974-29, of course, was promulgated without notice or opportunity for public comment.[4] Once this litigation had begun, the agency

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[3] A retired official of the Department of Interior, who had been responsible for administration of the regulations relating to injection wells, testified at trial. *See* Pet. App. B, pp. 55a-56a. No contrary evidence of abuse was either elicited or offered by the government.

[4] The government, quite misleadingly and without any citation to the record, portrays the industry as having an opportunity, before the agency issued Ruling 1974-29, to "argue[]," Br. in Opp. 3, and "comment[]," *id.* at 4, concerning the wisdom of excluding injection wells. The sad truth of the matter is that the agency adopted the interpretation stated in Ruling 1974-29 not only without requesting or receiving any comments from interested persons but also without informing itself about the practical consequences of its interpretation, without considering the treatment given injection wells by other federal and state agencies, and without referring to the statutory language or legislative history. *See* Pet. App. C, p. 132a; Pet. App. B, p. 96a; Pet. App. I, pp. 226a-227a. Moreover, the

vigorously resisted discovery into the basis for its action. *See* Pet. App. B, p. 39a. Finally, the industry was given the opportunity at trial to put the government's theory to the test of objective fact. After reviewing extensive evidence, *see id.* at 43a-52a, the district court unequivocally found that "the counting of injection wells has no greater potential for abuse than . . . excluding the counting of injection wells," *id.* at 84a.

Even though the government's basic theory had been exposed as nonsense, the court of appeals ignored the district court's finding and endorsed that theory anyway. *See* Pet. 18-19. The government seeks to paper this over by asserting that "any findings of fact were largely irrelevant to the TECA's conclusion." Br. in Opp. 15 n.18. But the court of appeals gave, as the "most important reason," Pet. App. A, p. 30a, for excluding injection wells, its own untutored opinion that "[i]ncluding injection wells in the count could possibly lead to a serious abuse of the purposes of the exemption," *id.* at 30a-31a. Thus, the court's improper disregard of the district court's findings was a vital element in its decision on the merits.[5]

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position adopted by the agency was contrary even to all of the internal advice received by the General Counsel concerning the technical reasons for treating injection wells in the same manner as recovery wells. *See* C.A. 10494-508, 10682-86, 10771-79.

[5] This problem was compounded by the fact that the court of appeals was focusing on the wrong issue, *i.e.*, the reasonableness of Ruling 1974-29 as a construction of the agency's own regulations rather than the reasonableness of the regulations as a construction of the underlying statutes. *See* Pet. 15-16. To be sure, as the government points out, Br. in Opp. 15 n.18, at the end of its opinion the court added, as an evident afterthought, a reference to the regulations. But the fact remains that whereas in its earlier opinion the court had carefully distinguished the question of the validity of the Ruling from that of the validity of the regulations, *see* Pet. App. F, pp. 209a-210a, in its final opinion the court neglected to draw any such distinction and treated the validity of the Ruling as dispositive, *see* Pet. App. A, pp. 30a-32a.

The government now argues that it really doesn't matter what the facts are because the agency was entitled to construe the statute in order to prevent abuse even if there was no potential for abuse. Br. in Opp. 15-16 n.18. The government rounds off its case by arguing that once an agency construes a statute, even if it does so without informing itself about the facts, its construction is entitled to judicial deference. *Id.* at 14-15. It should be obvious that something has gone wrong here.

The minimum requirement for sustaining an administrative interpretation of a statute should be rationality. If the only rational basis offered by the agency is found to be spurious, it logically follows that the agency's interpretation should be rejected. Any agency can, by receiving comments from interested persons, inform itself on the facts and establish a record of substantial evidence supporting its judgment. But where, as here, the agency chooses to operate in secret, without gathering facts or exposing its decision-making process to the light of day, its rationale must be tested in another forum. If the rationale fails that test, the agency's position should be rejected. A statutory intepretation is not reasonable merely because the agency, in the face of contrary findings of fact, continues to assert that it is. Otherwise, there would be little purpose in judicial review.

Similarly, the minimum requirement for according deference to an administrative interpretation should be a showing that the agency possessed and exercised expertise. In this case, the government should be embarrassed to argue that its interpretation is entitled to "[p]articular weight . . . ." Br. in Opp. 14. It is all too plain that the agency arrived at its position in a careless, slipshod manner. *See* Pet. 5-7, 20-22. There is no purpose in judicial review at all if administrative interpretations of this kind are to be paid uncritical deference by the courts.

3. The government's description of the facts is punctuated by prejudicial misstatements. Because those misstatements

are the foundation for a substantial portion of the government's argument on the merits, correction is necessary.

a. The government attempts to color its case by characterizing injection wells as "non-producing," Br. in Opp. i, and by calling recovery wells "producing wells," *id.* at 4. This is an effort, through innuendo, to draw a distinction that the district court found did not exist in fact. The factual questions at trial largely concerned the ways in which injection and recovery wells resembled and differed from one another. The district court concluded that the distinctions offered by the government were

> . . . distinctions without difference. The engineering contribution of an injection well is undisputed. The water forced into the reservoir, via the injection well, provides energy pressure, displaces crude oil, and forces oil from the reservoir into the well bore of a recovery well. The fact is that but for the injection wells, such crude oil would not have been obtained. It could not be produced under known oil production methods. Whether the oil is brought out of one well bore or a different well bore simply does not matter.

Pet. App. B, p. 102a. The court of appeals did not overturn these findings.

Now, the government seeks to confuse the matter by lumping injection wells together with shut-in wells, salt water disposal wells, water source wells, and observation wells. Br. in Opp. 3 n.2. The district court dealt with this tactic as well:

> No other type of well, however, contributes to the recovery process in the manner that both injection and recovery wells do. These are the only two types of wells which cause oil to flow within the reservoir.

Pet. App. B, pp. 48a-49a. The government's continued insistence that an injection well really is no different from, for example, a water source well simply illustrates that DOE still does not understand production processes in the industry it was supposed to be regulating. The Department of Interior, which has far greater experience and sophistication in these

matters, correctly understands that, unlike the other types of wells indiscriminately listed by the government here, injection wells are structurally identical to recovery wells, they extend physically into the crude oil reservoir, and they are an integral and necessary part of the production of crude oil. *See* Pet. 2-4.

b. In discussing the original enactment of the statutory exemption for stripper properties, the government attempts to give the impression that the congressional conferees instructed the agency to give the exemption a narrow definition. Br. in Opp. 2. The government then reverts to this point in making its argument about legislative intent. *Id.* at 9-10. What the conferees actually said was that they had "added new provisions to insure that the exemption is narrowly defined and prudently administered . . . ." H. R. Rep. No. 624, 93d Cong., 1st Sess. 29 (1973).[6] In other words, Congress thought that, by adding additional provisions, it had taken sufficient action itself to narrow the statutory definition. It was not authorizing the agency to eviscerate the exemption by excluding from the well count wells that were intended to be included.

c. The government incorrectly states that, at the time the exemption for stripper properties was re-enacted in 1976, "Congress specifically rejected attempts to enlarge the exemption in a manner that would have allowed inclusion of injection wells in the well count . . . ." Br. in Opp. 4. The government's invocation of the re-enactment doctrine is centrally based upon this misstatement of the legislative history. *See id.* at 12-13.[7]

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[6] The provisions added by the conferees (1) required that a lease must be operating at the maximum feasible rate of production and in accordance with recognized conservation practices and (2) authorized the agency to conduct on-site inspections. *See* section 406(b) and (c) of the Trans-Alaska Pipeline Authorization Act, 87 Stat. 590 (1973).

[7] The government additionally argues that inquiries made on behalf of constituents by individual congressmen, and a report to a House subcommittee made long before the 1976 legislation was introduced, warrant a presumption "that Congress was aware of the

The government has confused the amendment offered by Senator Bartlett in 1976 with a different amendment he offered in 1977. The amendment offered by Senator Bartlett in 1976 was not concerned with the inclusion or exclusion of injection wells in the well count.[8] Its purpose was to broaden the exemption to cover economically marginal production from properties other than stripper properties. *See* 122 Cong. Rec. 8757 (1976). In rejecting that amendment, the Conference Committee explicitly distinguished such non-stripper marginal production from "stripper well production, for which there is both a long legislative and administrative history . . . ." S. Rep. No. 1119, 94th Cong., 2d Sess. 71 (1976).[9] It was not until more than a year later that Senator Bartlett, acting in light of the agency's administration of the re-enacted exemption for stripper prop-

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interpretation." Br. in Opp. 12. They do not. Such episodic contacts, which took place outside the legislative process leading to re-enactment, do not establish "general awareness on the part of Congress," *SEC* v. *Sloan*, 436 U.S. 103, 121 (1978), and they fall short of "particular consideration of [the Ruling] by Congress during re-enactment." *Rowan Cos.* v. *United States*, 452 U.S. 247, 262 (1981).

[8] At that time, Senator Bartlett presumably shared the illusion, described later by his fellow Oklahoman, Senator Bellmon, that injection wells "would be included [because] [t]he Interior Department has long counted injection wells." 123 Cong. Rec. 36061 (1977).

[9] The "long legislative and administrative history" to which the conferees referred presumably concerned the Department of Interior's administration of the Mineral Land Leasing Act of 1920. *See* pages 2-3, *supra*.

In its argument, the government reveals that it really does understand that the 1976 Bartlett amendment did not relate to stripper properties. *See* Br. in Opp. 13-14. It nevertheless argues that rejection of that amendment evinced a lack of congressional interest in encouraging secondary recovery projects even on stripper properties. *Id.* But it is clear that Congress' action cannot be so read. It was concerned only that a broad exemption not be extended to non-stripper properties.

erties, sought a clarifying amendment requiring the inclusion of injection wells. See 123 Cong. Rec. 36058-63 (1977). Deletion of that post-enactment amendment in conference plainly "has no persuasive significance." *United States* v. *Wise*, 370 U.S. 405, 411 (1962).[10]

4. The government's remaining arguments on the merits are insubstantial.

a. The government can derive no comfort from "[t]he plain words of the statute . . . ." Br. in Opp. 8. The Department of Interior, faced with the same words, had no difficulty in determining that injection wells are to be included. The Department of Interior took the legislative objective into account and applied a functional analysis, looking to the physical relationship of the well to the reservoir and its role in the production of crude oil. In contrast, the agency here ignored the principal legislative objective and applied no analysis at all in reaching its opposite interpretation of the same statutory terms. Whatever else may be said of the two agencies' respective approaches to statutory construction, it is apparent that the reading insisted upon by the government here does not proceed ineluctably from the statutory text.

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[10] At the conclusion of its statement, the government asserts that the court of appeals' finding of a legislative intent to exclude injection wells was "[b]ased on a comprehensive review of the language and legislative history of the stripper well exemption . . . ." Br. in Opp. 6. It was not. The court expressly rested its conclusion about legislative intent upon three equally specious grounds: (1) the assertion that the agency had "applied a single and unequivocal interpretation of the stripping [*sic*] well regulations," Pet. App. A, p. 24a, even though the district court had explicitly found otherwise, *see* Pet. App. B, pp. 64a, 68a; (2) Congress' failure to modify Ruling 1974-29 during reenactment, Pet. App. A, pp. 24a-25a, which is discussed above; and (3) deletion of Senator Bartlett's 1977 amendment by the Conference Committee, *id.* at 25a, which also is discussed above.

b. One aspect of the government's misuse of the legislative history of the original statutory exemption for stripper properties already has been discussed. *See* page 7, *supra*. More generally, it can be seen that the government relies upon a hodge-podge of extracts taken from the conference report. *See* Br. in Opp. 9-11. The short answer to the government's reliance upon these extracts is that that portion of the report was prepared and included at the behest of William N. Walker, then the General Counsel of the Cost of Living Council, and Mr. Walker testified in this case that it was not written with injection wells in mind and was not intended to cause or justify the exclusion of injection wells from the well count. C.A. 8582-83.

For the reasons stated here and in the petition for a writ of certiorari, the petition should be granted.

Respectfully submitted,

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